INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	9

CITATIONS

Cases:

Spies v. *United States*, 317 U. S. 492 6

United States v. *Trenton Potteries*, 273 U. S. 392 9

Statutes:

Internal Revenue Code of 1939:

Sec. 53(a)(2) (26 U.S.C. 1952 ed., Sec. 53(a)(2)) 4

Sec. 145(a) (26 U.S.C. 1952 ed., Sec. 145(a)) 2, 7

Sec. 145(b) (26 U.S.C. 1952 ed., Sec. 145(b)) 7

Internal Revenue Code of 1954:

Sec. 6081 (26 U.S.C. 1952 ed., Supp. II) 4

Sec. 7201 (26 U.S.C. 1952 ed., Supp. II, Sec. 7201 7

Sec. 7203 (26 U.S.C. 1952 ed., Supp. II, Sec. 7203 ..... 3, 7

In the Supreme Court of the United States

October Term, 1957

No. 428

BENJAMIN N. LITMAN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 6a-10a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1957 (Pet. 11a) and a petition for rehearing was denied on August 6, 1957 (Pet. 12a). Petition for a writ of certiorari was filed September 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence of willfulness was sufficient to sustain the conviction.

2. Whether, where the instruction to the jury accurately covered every element of the offense, the trial court erred in refusing also to charge that if the failure to file timely returns was found to be due to the negligence of the petitioner's accountant a verdict of not guilty should be returned.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

(a) *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(26 U.S.C. 1952 ed., Sec. 145(a).)

Internal Revenue Code of 1954:

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7203.)

STATEMENT

On September 13, 1956, a three-count information was filed in the United States District Court for the Eastern District of Pennsylvania charging the petitioner with willfully and knowingly failing to file income tax returns for the years 1952, 1953 and 1954 within the time required by law. Counts one and two charged a violation of Section 145(a) of the Internal Revenue Code of 1939, and count three charged a violation of Section 7203 of the Internal Revenue Code of 1954. The information alleged that petitioner's gross income was $90,791.83 in 1952,

$81,856.81 in 1953 and $91,281.96 in 1954. (Pet. 1a-4a; R. 1a.) On December 4, 1956, after a jury trial of two days, petitioner was found guilty as charged (R. 1a, 84a-85a) and, on December 5, 1956, was sentenced to sixty days' imprisonment on each count, the sentences to run concurrently, and was fined $500 on the first count (R. 1a). The evidence to support the verdict may be summarized as follows:

Petitioner is a physician (R. 3a, 19a) who operates a hospital in Philadelphia, Pennsylvania (R. 18a, 38a, 44a, 77a). During the prosecution years he employed various bookkeepers to maintain the hospital records. (R. 39a.) Each year as the returns involved became due, requests for ninety day extensions of the time in which to file were made by his accountant, Charles Brahin (R. 11a-15a), after discussions with the petitioner (R. 36a, 58a), and the periods in which to file were accordingly extended (R. 11a-15a). Again, as these extended periods were about to expire additional successive extensions for varying lengths of time were requested and granted. Three such extensions were obtained for the 1952 and 1953 returns, respectively, and four were permitted for the 1954 return, thereby extending the time in which to file each of the returns a total of six months (R. 11a-15a), the maximum permitted under the law (R. 15a, 54a).[1] Accordingly, the 1952 return was due September 15, 1953, the 1953 return on September 15, 1954 and the 1954 return

[1] Section 53(a)(2), Internal Revenue Code of 1939, and Section 6081, Internal Revenue Code of 1954.

on October 15, 1955. (R. 12a-15a.) Each of the requests stated that an extension was sought because Mr. Brahin was ill and/or overburdened with work. (R. 12a-15a, 50a-56a.) However, at the trial Mr. Brahin testified that the requests were made on form letters, and that the extensions were actually sought because the petitioner's records were not complete. (R. 35a- 37a, 58a.) He further testified that each year, before the returns became due, he asked the petitioner to have the records completed so the returns could be prepared (R. 37a, 45a, 61a-62a), but petitioner failed to do so (R. 35a, 37a); that in October of 1954, when, at his own request, he was given the uncompleted 1952 and 1953 records, portions of the records were missing; that he called this to petitioner's attention and advised him that they must be located (R. 39a-41a); that he was subsequently regularly in contact with the petitioner, advised him that the returns must be filed, and explained the seriousness of the matter (R. 58a, 61a, 64a-65a); that at no time did he observe the petitioner searching for the missing records (R. 66a) though for approximately half a year (R. 41a) he came once or twice a month and searched for them himself (R. 40a).

In May of 1955 petitioner was first notified by the Internal Revenue Service that no record could be found of his 1952, 1953 and 1954 returns and he was requested to submit information and an explanation concerning his returns (R. 29a, 67a-68a.) Shortly thereafter, Mr. Brahin testified, he located the missing portions of the records among petitioner's medical

records at the hospital. (R. 26a, 29a, 40a-41a, 60a.) Though the petitioner advised the Internal Revenue Service in a letter dated June 6, 1955, that he intended to file the delinquent 1952 and 1953 returns (R. 23a)[2] and made similar representations to the investigating agent in December of 1955 concerning the 1954 return as well (R. 18a-19a), they were not filed until March 16, 1956 (R. 4a), after Mr. Brahin had personally secured a bookkeeper to complete the records (R. 62a). The delinquent returns disclose a gross income of $86,646.18 in 1952, $73,670.43 in 1953, and $83,944.56 in 1954. (R. 3a-4a.)

ARGUMENT

Petitioner first urges that the Government was required to show that his failure to file timely returns was, in addition to being voluntary, the result of an evil motive, and that it failed to do so. (Pet. 2, 10-12.) This Court said in *Spies* v. *United States*, 317 U. S. 492, 497-498, that "Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness." But, it is unnecessary to decide here whether mere voluntary failure to file timely returns meets the statutory requirement of willfulness, for this record demonstrates that the petitioner intended to deprive the Government of returns which he knew he was legally required to file. His act of omission was not only voluntary but done with full knowledge that he

[2] Under the extensions, the 1954 return was not due until the following October. (R. 14a-15a.)

was shirking his duty under the law; it was therefore a misdemeanor under the provisions of Sections 145(a) and 7203 (*supra*, pp. 2-3), and no other showing of evil motive is required. The further showing which petitioner would require is a requisite only under the felony provisions of Sections 145(b) and 7201.[3] Furthermore, the record here, in any event, clearly permits the inference that the petitioner's willful failure to file the returns when due was motivated

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[3] Internal Revenue Code of 1939:

SEC. 145.. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

Internal Revenue Code of 1954:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7201.)

by a desire to conceal his tax liability from the Government and escape payment of the tax.

Mr. Brahin testified that in January, 1953, when he came for petitioner's 1952 records they were not complete (R. 35a) and that they, along with the 1953 and 1954 records, were not completed until 1955 (R. 62a, 68a-69a) after investigation of petitioner's failure to file had begun, and when he, Brahin, personally secured a bookkeeper for the purpose (R. 62a); that as an accountant it was not his responsibility to do petitioner's basic bookkeeping but, in his practice, he regularly prepared returns from completed records furnished by his clients (R. 45a, 56a-57a, 61a); that he repeatedly advised the petitioner that it was his (petitioner's) duty to see that his records were completed and that returns must be filed (R. 58a, 61a-62a), and that he sought the extensions of the time in which to file only after discussion with the petitioner (R. 36a, 58a).

The Court of Appeals, after careful review of the evidence, concluded that (Pet. 8a):

> There was enough here to justify the jury in concluding that the defendant intentionally persisted in a course calculated to avoid or to disable himself from supplying his accountant with information appropriate and adequate for preparing his tax returns until the danger of governmental action became obvious and imminent.

The evidence was, therefore, clearly sufficient to support the conviction.

2. Petitioner also contends that the trial court erred in refusing to instruct the jury that if it found

that the failure to file timely returns was due to the negligence or carelessness of his accountant a verdict of not guilty must be returned. (Pet. 2, 12.) This contention is without merit. The jury was instructed (R. 82a):

> Now if you come to the conclusion the action, or lack of action, of this defendant in filing his returns was due to inadvertence or carelessness or negligence, even gross negligence, then you should acquit him.

As this Court noted in *United States* v. *Trenton Potteries*, 273 U. S. 392, 396, where, as here, an instruction is correctly given, the trial court may properly refuse to give the same basic instruction in another form.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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